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No. 711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE BURKE-PARSONS-BOWLBY CORPORATION, ET AL.,
Appellants,

against

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of West Virginia

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JURISDICTIONAL STATEMENT

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October 1967

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JURISDICTIONAL STATEMENT

Appellants are The Burke-Parsons-Bowlby Corporation, C. A. Parrish Company, Mountaineer Lumber Company, Inc., Hardwood Corporation of America, Bill Bailey, doing business as B&K Feed Store, Monarch Rubber Company, and the Public Service Commission of the State of West Virginia. They ap-

peal from the judgment of the United States District Court for the Southern District of West Virginia, entered on June 13, 1967, which dismissed their complaint and denied their request for a permanent injunction enjoining the operation of, and the taking of any steps to effectuate, the order of the Interstate Commerce Commission (I.C.C.) entered October 7, 1965 in its Finance Docket No. 22930, *Baltimore & Ohio Railroad Company Abandonment Between Ravenswood and Spencer, W. Va.*, which order authorized the abandonment of the Ravenswood, Spencer and Glenville (RS&G) branch of The Baltimore and Ohio Railroad Company (B&O).

The abandonment has been stayed by the district court pending determination of this appeal.

Appellants submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented for determination.

OPINIONS BELOW

The final judgment dismissing the complaint of these appellants was made and entered by the district court on June 13, 1967, a copy of which is set forth herein as Appendix A.

The opinion of the district court, directing entry of said judgment, is report at *Burke-Parsons-Bowlby Corporation* v. *United States*, 268 F. Supp. 203, and is set forth herein as Appendix B.

The final order of the Interstate Commerce Commission, Division 3, dated October 7, 1965, denying petition for reconsideration, is set forth herein as Appendix C.

The report and order of the Interstate Commerce Commission, Finance Review Board, decided March 29, 1965, is reported at *Baltimore & O. R. Co. Abandonment,* 328 I.C.C. 108, and is set forth herein as Appendix D.

The report and order recommended by the Hearing Examiner, dated December 9, 1964 and served December 14, 1964, is set forth herein as Appendix E.

JURISDICTION

The action in the district court was instituted by appellants for the purpose of setting aside and enjoining a final order of the Interstate Commerce Commission, pursuant to the judicial review provisions of Title 28 of the United States Code, Sections 1336, 1398, 2284 and 2321-25 inclusive, and the relief sought having been denied by the three-judge district court, jurisdiction of the Supreme Court of the United States of this appeal is conferred by Title 28 of the United States Code, Sections 1253 and 2101(b).

The judgment dismissing the complaint was entered June 13, 1967. Notice of Appeal was filed in the district court on August 11, 1967.

STATUTE INVOLVED

This appeal involves Section 1(18) of the Interstate Commerce Act, 49 United States Code Section 1(18):

> After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transpor-

tation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

QUESTION PRESENTED

May the Interstate Commerce Commission authorize a railroad abandonment pursuant to Section 1(18) of the Interstate Commerce Act without making a finding as to the estimated future traffic for the line sought to be abandoned?

STATEMENT

This is a direct appeal from the judgment of a three-judge district court sustaining the validity of an order of the Interstate Commerce Commission authorizing the abandonment of the 32-mile RS&G branch line of B&O, which extends from the Ohio River to Spencer, West Virginia, all in the State of West Virginia. Appellants herein were protestants before the I.C.C. and were plaintiffs in the district court.

The area served by the involved branch line has underdeveloped timber resources. It is part of the Appalachian region for purposes of the Appalachian Regional Development Act of 1965, a region which Congress has found to be deficient in transportation facilities. It is undisputed, and the I.C.C.'s hearing examiner found, that the five county area served by the branch line is sparsely settled, the per capita income is low, and it is economically a depressed area.*

The Recomended Report

The I.C.C.'s hearing examiner on December 9, 1964 recommended that the application for abandonment be denied. In determining whether the present or future public convenience and necessity permitted abandonment of the railroad, considerable weight was given to the testimony by a large paper manufacturing company that it is interested in locating a facility on the branch line, with the prospect of employment for 600-900 people each year. However, this facility would not be established if rail service is not available and the operations over the branch are discontinued:

> "A large paper manufacturing company is interested in procuring a site along the branch for the purchase, storage, and shipment of pulpwood. The estimated tonnage moving out over the branch from such a yard would be approximately 500 carloads of pulpwood per year. Such a yard would entail annual gross expenditures of some $400,000, a capital investment of $50,000, would furnish income for perhaps 150 suppliers

* The bearing of the Appalachian Regional Development Act of 1965, P.L. 89-4, upon the question presented was first raised in the I.C.C. proceedings upon petition for reconsideration, since the law was enacted on March 9, 1965.

> and furnish some work for 600 to 900 people each year. A concentration yard would not be established or continued if rail service was not available."

The hearing examiner determined that operation of the branch resulted in a system loss to B&O in the minor amount of $15,950 for the year 1963, and $3,267 for the first four months of 1964.* From the evidence he found that it was not possible to determine with any degree of accuracy the precise amount that would be required to rehabilitate the branch for substantial increased use.

Finance Review Board Report

Exceptions were filed by B&O to the recommended denial of its application for abandonment. On March 29, 1965 the I.C.C.'s Finance Review Board, consisting of three employees, reversed the order of the hearing examiner, and concluded to grant the application. Although adopting the examiner's findings as to the 1963 and 1964 operating results, the Review Board held, "the speculative nature of the evidence with respect to future traffic detracts from its probatory effect." (328 I.C.C. at 114-15) Specifically, the Review Board placed the burden upon protestants to "assure" the B&O of future traffic. Thus:

> "In view of the fact that operations over the branch have not been profitable for the last 3 years—and there can be no dispute on this point—the applicant should not be compelled to assume the heavy and burdensome financial obligations with respect to the repair and future

* The Examiner found that inclusion of non-revenue traffic would reduce the 1963 loss to $5,908.

> maintenance of the branch unless potential traffic could be assured to the full extent visualized by the protestants. The traffic and revenues contemplated, however, cannot be predicted with any degree of certainty." (328 I.C.C. at p. 114)

The Review Board concluded that the cost of rehabilitating the branch could not be determined with mathematical exactness, but that it was convinced that such cost would be no less than $800,000. (328 I.C.C. at 114-15) A key finding of the Review Board was that continued operation of the line would impose an undue and unnecessary burden upon B&O and upon interstate commerce. (328 I.C.C. at 115)

Petition for Reconsideration

Protestants petitioned the I.C.C. for reconsideration and for further hearing, which was summarily denied on October 7, 1965 by Division 3 of the I.C.C., acting as an Appellate Division. In view of the intervening enactment of the Appalachian Regional Development Act, protestants first raised the question of the I.C.C.'s added duty in their petition for reconsideration.* Appellants thereupon instituted suit in the district court.

Opinion of the District Court

The three-judge district court affirmed the I.C.C. order authorizing abandonment. The district court concluded that its examination of the record supported the administrative conclusion that the possibility of increased use of the branch does not warrant a finding that the area will generate sufficient traffic to reduce

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* Cf. *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 692, 709-10 (Feb. 21, 1967).

losses that would be incurred in operating the branch at safe maintenance standards. Dissolution of the restraining order has been stayed pending disposition of this appeal to the Supreme Court of the United States.

THE ISSUE INVOLVED IS SUBSTANTIAL

The fundamental issue in this proceeding is whether the I.C.C. can avoid a finding as to future traffic prospects consistent with the statutory terms of Section 1(18) of the Interstate Commerce Act. Contrary to the inference in the opinion of the district court, there is no finding by the agency as to what the level of traffic might be if operation of the branch line is continued. The report of the Review Board does not even contain the quasi-jurisdictional finding that the future public convenience and necessity permit abandonment. Rather, the finding is made that continued operation would impose an undue and unceses-sary burden upon the railroad and upon interstate commerce. (328 I.C.C. at p. 115)

Appellants appreciate that the estimation of future traffic is subject to judgment factors. The I.C.C., however, is charged with expertise in this subject. The agency has failed to come to grips with its duty to estimate the future requirements for railroad service in the affected area.

Section 1(18) of the Interstate Commerce Act does not employ the term "undue and unnecessary burden" upon either the railroad or upon interstate commerce as a standard for decision. Section 1(18) specifies only one standard, namely, "whether the present or future public convenience and necessity permit of such

abandonment." While the burden upon the carrier is an important consideration, this must be evaluated with the benefits of continued operation for particular communities. *Colorado* v. *United States,* 271 U.S. 153 (1926). This evaluation has not been made yet by the agency in this case because there is no subsidiary finding as to the future requirements of commerce.

Appellants presented the testimony of a leading paper company interested in locating a tremendous facility in the area. This witness, from West Virginia Pulp and Paper Company, made estimates of future traffic. The I.C.C.'s hearing examiner found that traffic prospects for the branch line were itself equal to the total movement in 1963. The Review Board, nevertheless, failed to specify whether any weight was to be given this testimony. The Review Board made no positive finding as to future traffic. It disposed of the case by finding an undue burden upon the carrier and upon interstate commerce if the branch line is continued in operation.

The judgment of the district court should be reversed and the cause remanded to the I.C.C. for the determination of the future need for the branch line by the present and prospective shipping public. Only in this way can the I.C.C. make the requisite statutory finding as to whether the present or future public convenience and necessity permit abandonment.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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October 1967

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 3357

THE BAKER-PARSONS-BOWLBY CORPORATION, a corporation,
C. A. PARSONS COMPANY, A copartnership,
MOUNTAINEER INVESTMENT COMPANY, INC., a corporation,
ROBINSON CORPORATION OF AMERICA, a corporation,
BILL BAILEY, doing business as B & K Feed Store,
MIDLAND RUSSIAN COMPANY, a corporation, and the
PUBLIC SERVICE COMMISSION OF THE STATE OF WEST
VIRGINIA, a governmental corporation,

APPENDIX

Plaintiffs,

v.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

THE BALTIMORE & OHIO RAILROAD COMPANY,
a corporation, *Intervening Defendant.*

Order

The above-entitled action having come on for hearing on January 27, 1967, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. § 2284, and this Court having filed its memorandum opinion sustaining the assailed orders of the defendant, the Interstate Commerce Commission, it is accordingly ADJUDGED and ORDERED that the relief prayed for in the complaint herein be denied and that the same shall be dismissed. And it appearing to the Court that the plaintiffs intend to take an appeal to the Supreme Court of the United States, upon motion of the plaintiffs, it is further ORDERED that the execution of the injunc-

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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October 1967

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 3337

THE BURKE-PARSONS-BOWLBY CORPORATION, a corporation,
C. A. PARRISH COMPANY, a copartnership,
MOUNTAINEER LUMBER COMPANY, INC., a corporation,
HARDWOOD CORPORATION OF AMERICA, a corporation,
BILL BAILEY, doing business as B & K Feed Store,
MONARCH RUBBER COMPANY, a corporation, and the
PUBLIC SERVICE COMMISSION OF THE STATE OF WEST
VIRGINIA, a governmental corporation,
Plaintiffs,

v.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

THE BALTIMORE & OHIO RAILROAD COMPANY,
a corporation, *Intervening Defendant.*

Order

The above-captioned action having come on for hearing on January 27, 1967, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. § 2284, and this Court having filed its memorandum opinion sustaining the assailed orders of the defendant, the Interstate Commerce Commission, it is accordingly, ADJUDGED and ORDERED that the relief prayed for in the complaint herein be denied and that the complaint be dismissed. And it appearing to the Court that the plaintiffs intend to take an appeal to the Supreme Court of the United States, upon motion of the plaintiffs, it is further ORDERED that the dissolution of the injunc-

tion or restraining order heretofore awarded by this Court be STAYED pending a timely appeal by plaintiffs to the Supreme Court of the United States as provided by law and pending further the disposition of said appeal by said Court and all further proceedings herein, if any, as directed by said Court.

ENTER: June 13, 1967.

HERBERT S. BOREMAN
Herbert S. Boreman
United States Circuit Judge

JOHN A. FIELD, JR.
John A. Field, Jr.
United States District Judge

SIDNEY L. CHRISTIE
Sidney L. Christie
United States District Judge

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Civil Action No. 3337

BEFORE BOREMAN, CIRCUIT JUDGE, AND FIELD AND CHRISTIE, DISTRICT JUDGES

PER CURIAM:

This is an action under 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-2325, to enjoin and set aside the report, order and certificate of the Finance Review Board of the Interstate Commerce Commission in the proceeding entitled *The Baltimore and Ohio Railroad Company Abandonment between Ravenswood and Spencer, West Virginia*, Finance Docket No. 22930, decided March 29, 1965, and an order

of Division 3 of the Commission entered on October 7, 1965, denying reconsideration of that decision. The effect of the orders in issue was to grant the application of The Baltimore and Ohio Railroad Company for a certificate of public convenience and necessity permitting its abandonment of a line running from Ravenswood to Spencer, West Virginia, a total distance of approximately 33 miles.

The railroad filed its application before the Commission on January 7, 1964, and hearings were held upon the protests of various interested parties, including the plaintiffs herein, in July and August of that year. The hearing examiner filed his report on December 9, 1964, summarizing the factual details incident to the application, and recommended that the application of the Baltimore and Ohio be denied. The railroad then filed written exceptions to which the protestants replied, and on March 29, 1965, the Finance Review Board declined to adopt the recommendation of the examiner and entered its report, certificate and order granting the railroad's application. The protestants filed petitions for reconsideration and rehearings, and on October 27, 1965, Division 3 of the Commission, acting as an Appellate Division, entered an order denying such petitions. The complaint in the present proceeding was filed in this Court on October 29, 1965, and an order was entered on that date enjoining the enforcement of the Commission's order until such time as the present action shall have been determined by this Court.

The statutory authority of the Commission to authorize the abandonment of all or any portion of a line of railroad is found in 49 U.S.C.A. § 1(18), the relevant portion of which reads as follows:

> "* * * [N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line or railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Under this Section, of course, the sole question presented to the Commission for determination was whether public convenience and necessity would permit the proposed abandonment of the Ravenswood-Spencer branch line. Likewise, the Commission's determinations of this question should not be annulled or set aside by this Court if upon the record it appears that it is based upon adequate findings which are supported by substantial evidence. The limits of our judicial review were stated in *Miss. Valley Barge Line Co.* v. *United States,* 292 U.S. 282 (1934) as follows: "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." In emphasizing this limited judicial role the Supreme Court stated in *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515 (1946) at 536:

> "• • • It [the Court] cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

The Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq. has not altered the scope of judicial review nor the accepted rule of administrative finality. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951); *Baltimore Transfer Co.* v. *Interstate Commerce Comm.,* 14 F. Supp. 558 (D.C. Md. 1953) aff'd 346 U.S. 890.

The facts as set forth in the examiner's report were adopted by the Finance Review Board. They indicate that the line in question begins at Ravenswood on the Ohio River and winds through a sparsely settled area of Jackson and Roane Counties, West Virginia, for a distance of some 33 miles to the Town of Spencer. The roadway has many curves ranging up to 14°, crosses 59 bridges and

the general physical condition of the branch is poor. Maximum allowable speeds are five to ten miles an hour and the condition of the roadway limits both the tonnage and number of cars that can be moved. Passenger service was discontinued in 1963 and freight service is presently on a demand schedule, depending on traffic requirements.

Most of the traffic of the branch originates or terminates at Spencer. However, there are no private sidetracks on the branch and all shippers truck their rail freight to and from team tracks. The Spencer area is served by some nine motor common carriers in addition to contract and private motor carriers. In 1963 the branch handled 539 revenue carloads which was a decline of about 50% from the 1,089 carloads moved in the year 1953. During the past ten years the population of Doane County has declined and thirteen industries that provided substantial rail traffic have gone out of business.

The record indicates clearly that despite the fact that maintenance has been minimized in recent years, the branch continued to show an operating loss. While there was a sharp conflict in the evidence with respect to costs of repairing or rehabilitating the branch, the Finance Review Board concluded that such costs would be no less than $800,000. While the plaintiffs and protestants argued that deferred maintenance and the resultant need of rehabilitation was due to the negligence of the railroad, the Review Board concluded that in the light of the losses incurred and the decline in traffic, there was no reason to believe that maintenance was deferred for any purpose other than to continue operations as long as possible.

Our examination of the record indicates that it supports the administrative conclusion that the possibility of increased use of the branch does not warrant a finding that the area served by it will generate sufficient traffic in the future to reduce losses that would be incurred in operating the branch at safe maintenance standards. We further

agree that the record indicates that all of the shippers on the branch are currently using motor transportation to some degree and that there is adequate motor service available to meet the needs of the area shippers.

Section 1(18) specifies only one standard in a case such as this, namely, "whether the present or future public convenience and necessity permit af such abandonment." The broad scope of the Commission's authority in considering what does or does not comport with "public convenience and necessity" was recognized in *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60 (1944) at 65, as follows:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. *Case* v. *Los Angeles Lumber Co.,* 308 U.S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio R. Co.* v. *United States,* 283 U.S. 35, 42. Cf. *Gray* v. *Powell,* 314 U.S. 402, 411-12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell* v. *United States,* 300 U.S. 276, 287. This, of course, gives administrative dis-

cretion to the Commission, Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

This administrative discretion has long been recognized in cases arising under Section 1(18) of the Act. In *Chesapeake & Ohio R. Co.* v. *United States*, 283 U.S. 35 (1931), the Court said, at page 42:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. * * *"

In the present case we recognize, as did the Commission, that in most abandonments some inconvenience and hardship are imposed upon the users of the line. It is necessary, of course, in such cases that the Commission weigh the advantages of abandonment against the disadvantages. In the landmark case of *Colo.* v. *United States*, 271 U.S. 153 (1926), the Court recognized that "The sole test prescribed is that abandonment be consistent with public necessity and convenience," and went on to state at page 166:

> "* * * The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

In the exercise of its discretion the Commission has concluded that the abandonment of the line here in question is consistent with the public convenience and neces-

sity. Our review of the record persuades us that this conclusion is based upon adequate findings which are supported by substantial evidence.

For the foregoing reasons the complaint will be dismissed.

APPENDIX C

Service Date
October 13, 1965

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 7th day of October, A. D. 1965.

Finance Docket No. 22930

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN RAVENSWOOD AND SPENCER, W. VA.

Upon consideration of the record in the above-entitled proceeding, including the report and order of the Finance Review Board, dated March 29, 1965, granting the certificate under section 1(18) of the Interstate Commerce Act subject to certain terms and conditions; the petitions for reconsideration, oral argument, and further hearing filed by certain protestants on August 16, 1965, and the replies of applicant filed September 7, 1965; and

It appearing, That the material matters set forth in the petition for reconsideration have been considered by the said Board and discussed in its report; that the Board's decision is based upon adequate findings supported by the record; that no showing has been made warranting reconsideration; that oral argument is not required; and that the reasons advanced for further hearing are not such as to warrant granting the petition:

It is ordered, That the said petitions be, and they are hereby, denied; and

It is further ordered, That the said order of the Finance Review Board shall be effective 20 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 22930

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN RAVENSWOOD AND SPENCER, W. VA.

Decided March 29, 1965

Certificate and order issued permitting abandonment by The Baltimore and Ohio Railroad Company of its Ravenswood, Spencer, and Greenville branch line between Ravenswood and Spencer, W. Va. Conditions prescribed.

George C. Doering for applicant.

Robert L. Hart for Public Service Commission of West Virginia, and *J. Henry Barbour* for the Governor's Committee on Wood Utilization of West Virginia.

George M. Scott for protestants.

Burke W. Fertig, G. C. Ford, Paul D. Maxwell, and *Bevan O. Wilcox* for railway labor organizations.

Report of the Commission

By Finance Review Board, Members Wood, Pursell, and Feuer.

Pursell, *Board Member:*

Exceptions to the examiner's report and recommended order, embracing a request for oral argument, were filed by the applicant to which the Public Service Commission of West Virginia and other protestants[1] replied. Our conclusions differ from those of the examiner.

By application filed January 7, 1964, The Baltimore and Ohio Railroad Company, a common carrier by railroad subject to part I of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1(18)-(20) of the act, permitting abandonment of its Ravenswood,[2] Spencer, and Greenville branch line (R.S.&G., or branch) extending in an easterly direction from Ravenswood, in Jackson County, to the end of the branch at Spencer, in Roane County, a distance of 32.77 miles.

A hearing has been held and appearances in protest to the abandonment were made by the Public Service Commission and the Governor's Committee on Wood Utilization; both of West Virginia, the shippers and prospective users of the branch, and representatives of railway labor organizations. Applicant and representatives of the labor groups are agreeable to the imposition of the same conditions for the protection of employees as were imposed in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700, if the abandonment is authorized. Our findings herein are subject to the imposition of those conditions.

Protestants move that appendix 2 attached to applicant's exceptions be stricken since it relates in part to annual

[1] Collectively referred to hereinafter as protestants.

[2] All points and areas mentioned are in West Virginia.

traffic and earnings needed to cover operating expenses and to amortize at 5-percent interest the rehabilitation cost of the branch. Protestants contend that the statement is argumentative, contains conclusions unsupported by the evidence, and is made by a person not available for cross-examination. Protestants' motion is well taken. A portion of the statement pertaining to the expenses and revenues of applicant's branch and system is already included in the appendix attached hereto. Other statistics in the statement not a matter of record cannot be accorded consideration.

The positions of the parties, facts pertinent thereto, and financial data involved in the proposal are st forth in the examiner's report and are adopted as our own. They will be repeated only to the extent necessary for clarity of discussion.

The branch begins at a connection with applicant's Ohio River line at Ravenswood and serves several stations along its route to Spencer. The area is sparsely settled. Jackson and Roane Counties, served by the branch, have populations of 19,200 and 15,100, respectively. The single-track branch winds through hill country with many curves ranging up to 14 degrees, ruling grades of 3.1 percent eastbound and 3.4 percent westbound, and crosses 59 bridges totaling 1.4 miles in length. About half of the bridges are more than 50 feet in length. The physical condition of the branch is poor. Maximum allowable speeds are 5 to 10 miles an hour. Operations are limited to movement of loads of 200,000 pounds by a 1,000 horespower diesel yard-switching engine and to a restricted number of cars (550 gross trailing tons). Since February 1963, passenger service has been discontinued and freight service cut to a demand schedule. The latter service is provided 2 or 3 days each week, depending on traffic requirements.

Most of the traffic handled on the branch originates or terminates at Spencer. The continuation of rail service

over the branch is of primary concern to those in the area engaged in wholesale and retail sales activities in lumber products, groceries, building and farm supplies, and in general merchandising. Since there are no private sidetracks on the branch, all the shippers (except one located so close to the line as to be able to utilize a conveyor) truck their rail freight to and from team tracks. In addition to contract and private carriers, the Spencer area is served by some nine motor common carriers. The 539 revenue carloads handled on the branch in 1963 are just about half of the 1,089 cars moved in 1953. The population of Roane County declined from 18,408 persons in 1950 to 15,100 persons in 1963. During the past 10 years, 13 industries that provided substantial rail traffic have gone out of business.

The examiner found that the applicant failed to show present and future public convenience and necessity permit the abandonment of the branch. He concluded (1) that although rail service on the branch had declined over the past 10 years, there is a possibility of new potential traffic consisting primarily of pulpwood, lumber products, sand and gravel, (2) that despite the fact that these products move on low rates, the impact on future revenues would be significant—perhaps in the amount of $150,000 or more, (3) that lower rates on lumber have enabled sawmill operators in the area to reach into new markets, and that this circumstance will develop additional traffic of this commodity in the future, and (4) that, weighed against the deficit to the system in operating the branch and the necessary cost of extensive rehabilitation, this potential future traffic demonstrates a specific need for the rail service to the public.

In determining that opportunities for a potential traffic increase exist on the branch, the examiner pointed out the following: A lower rail rate could divert to the branch some 333 carloads of sand and gravel a year, which a con-

struction company now moves by barge to Ravenswood and by truck to Spencer. This traffic could provide additional revenue of $30,000 a year, all of which would be credited to the branch line. A large paper manufacturer, interested in building a concentration yard along the branch, could provide 500 carloads of pulpwood a year for movement on the branch, generating an estimated gross revenue of $120,000 for the applicant. A manufacturer of shoe soling material, that ships all raw and finished material by truck except inbound shipments of clay, would be able to develop some potential rail traffic of outbound material by active solicitation under plan V trailer-on-flatcar service.

In 1963, total revenues of $84,906 accrued to applicant from all freight handled on the branch. Of this amount, $9,816 was assigned to the branch on a mileage pro rata basis, and $75,090 to the system. Expenses for 1963 assigned to the branch totaled $63,311, and are itemized in the attached appendix. The record discloses an additional expense for overtime wages for round trip operations during 1963 not shown in the appendix of $8,141. Thus, expenses of operating the branch totaled $71,451; and the out-of-pocket loss of operating the branch was $61,636 for the year 1963. Using the generally accepted 50-percent formula in computing expenses of moving traffic over system lines, and reflecting the aforesaid additional expense, the net system loss shown in the appendix would be increased to $24,091.

Of the 723 cars handled on the branch in 1963, 184 carried applicant's railroad ties from Spencer. Such carrier property is properly classified as nonrevenue freight. Accordingly, the examiner found that the branch should be credited with the expense incurred in handling this company material, citing *Dawson Ry. Co. Abandonment*, 295 I.C.C. 273, 275. On the basis of a total 723 cars handled, and expenses of $71,451 (including those listed in the apppendix, and overtime wages), the average per car expense was com-

puted by the examiner to have been $98.82. On this basis, the expense attributable to nonrevenue cars was determined to be $18,183, which the examiner found would, in effect, reduce the claimed loss in operating the branch line in 1963 to $5,908.

On exceptions, applicant contends that in computing the nonrevenue traffic cost on a per car basis, expenses totaling $42,894 were erroneously included by the examiner as "additional expense" and should be deducted from the total expenses of operating the branch. The expenses complained of include maintenance of track ($24,000), car owner-user costs ($12,281), station expenses ($6,595), and less-than-carload costs ($18). Exclusion of these costs produces an average branch line and locomotive expense of $39.50, or a total of $7,286 expense for the 184 nonrevenue cars. Using applicant's computations and the 50-percent formula, net loss in 1963 would be $16,823; average revenue from the 539 revenue cars handled would be $157.53; and average expense per car $188.74.

In reply to this exception, protestants argue that nonrevenue, no less that revenue traffic, requires track maintenance, and that, in the absence of evidence of actual labor costs for maintenance during 1963, no consideration should be given to the applicant's $24,000 maintenance estimate. Protestants contend that applicant by premature announcement of intention to abandon the branch discouraged prospective business interested in locating on the branch and, under the circumstances, is estopped from complaining of an operating loss.

In other exceptions, applicant reiterates that necessary repairs for continued operation of the branch will cost at least $800,000, and that facts of record, not stated by the examiner in his report, refute the need of the branch for traffic in the area. It points out that its estimated net cost of $1,272,166 for rehabilitation of the entire branch embraces repair of some 59 bridges and structures, re-

placement of substantially all the rails, ties, et cetera, whereas protestants' submitted estimate of $592,470 for rehabilitation is limited to 5 miles of track in curved areas, and reworking or restoration of the remaining 27 miles without replacement of rails and track materials except for about 60 percent of the ties. Applicant stresses that protestants' estimate does not include cost for structure or bridge repair ($62,600, station repair ($2,000), and purchase of tieplates ($127,680), and that any proposed rehabilitation approximating $800,000 would not increase bridge ratings and would not permit use of the 1,600 horsepower engine.

In reply, protestants attribute the poor maintenance of the branch to the neglect of applicant over the past several years, and argue that applicant should not be permitted in the instant abandonment proceeding to take advantage of a situation created by its own negligence. As to what repairs are necessary, protestants argue that there is irreconcilable conflict in the evidence presented by applicant on this issue. The protestants contend that their estimated cost of $592,470 was offered to show how much the needed repairs would cost if done by an independent contractor, furnishing all the materials, equipment and labor. It is urged that the applicant could repair the branch at substantially less cost.

Several of the 13 users or prospective users of the branch ship a majority of their traffic by truck. In its exceptions, applicant points out that since the bulk of the timber acreage is in Wirt County, north of Spencer, the pulpwood concern interested in establishing a concentration yard along the branch, would have to haul 20 miles from the forest to the yard and that the present pulpwood shipper at Billings, 6 miles west of Spencer, has another concentration yard 5 miles below Ravenswood on the Ohio River line, and in the event of abandonment of the branch would seek another location in place of the Billings yard.

Lumber and hardwood shipments, according to applicant, move primarily by truck. In this respect, applicant points out that a sawmill operator, located 5 miles from Spencer, who shipped 20 carloads in 1963, confirmed that 40 percent of his shipments are by truck; that another shipper with sawmills at Elizabeth and Grantsville, 24 and 30 miles, respectively, from Spencer, transports most hardwoods by truck, and all shipments less than 200 miles move by that mode; that a lumber concern at Billings estimated that the value of its rail shipments in 1963 was less than one-sixteenth of its gross business of $860,000; and that a manufacturer of shoe soling material used rail service for transporting 24 inbound shipments of clay, representing about 8 percent of its traffic, 80 percent of its inbound and all of its outbound shipments move by truck. Applicant also contends that plan V trailer-on-flatcar service, suggested by the examiner, would involve over-the-road common carrier movement between the company's plant and the railroad at Parkersburg, and thus would not increase traffic for the branch; that the majority of the traffic of the two building supply firms is also handled by truck, one of which uses this mode for 60 percent of its volume, and approximately three-fourths of the other's shipments, having an invoice value of about $330,000 of the total volume of business of $550,000, move by truck. It also points out that the wholesale grocer at Spencer received 11 cars in 1963 compared to 39 cars in 1953, notwithstanding that its volume of business over that period increased from $250,000 to approximately $400,000.

Discussion and Conclusions

No reasons are given by the applicant why oral argument would be of benefit in the disposition of the proceeding. In view of our ultimate findings, however, the request becomes of no consequence.

The branch has been unable to meet expenses notwithstanding the fact that its maintenance has been minimized to about $711 per mile per year during the past 3 years.

Despite an increase of approximately $20,000 in total revenues and a decrease of about $25,000 in expenses of operating the branch in 1963 in comparison to 1962, the branch nevertheless sustained a loss for 1963. The line's present condition is poor, and the record is clear that immediate extensive repairs are imperative. Applicant's evidence is designed to show that continued operation of the branch constitutes an undue financial burden upon interstate commerce and the carrier itself, and that public convenience and necessity no longer require operation of the branch. The protestants' position is that the poor condition of the branch is attributable to applicant's neglect; that new industry, attracted by incentive on lumber and other commodities, will provide new traffic to supplant the present paucity of freight; and that abandonment of the branch would seriously and permanently impair the economy of the area.

The cost of repairing or rehabilitating the branch cannot be determined with mathematical exactness, but such cost, in any event, is obviously substantial, regardless of whether the computations of applicant or of the protestants are accepted. We are convinced, however, that needed rehabilitation costs would be no less than $800,000. There is nothing of record to support the argument of protestants that deferred maintenance on the branch is the result of negligence of the applicant. Considering the losses incurred and the steady decline in the number of carloads of traffic handled, there is no reason to believe that maintenance was deferred for any reason other than to continue operations as long as possible. In view of the fact that operations over the branch have not been on this point—the applicant should not be compelled to assume the heavy and burdensome financial obligations with respect to the repair and future maintenance of the branch unless potential traffic could be assured to the full extent visualized by the protestants. The traffic and revenues contemplated, however, cannot be predicted with any degree of certainty.

The prospects that some users—old and new—anticipate increased use of the branch does not warrant finding that the area will generate sufficient traffic in the future to reduce to a substantial degree the losses that would be incurred in operating the branch at safe minimum maintenance standards. Thus, it follows without any doubt whatsoever that costs of rehabilitation which it would be forced to make if we denied the application could not be recouped by applicant. The speculative nature of the evidence with respect to future traffic detracts from its probatory effect. All of the shippers on the branch are either currently using motor transportation for some portion of their movements, or are competing with other shippers employing motor carrier service. The record is convincing that there is adequate motor carrier service available to meet the needs of the area shippers. Sound judgment dictates that the present pattern of transportation by motor vehicle will not be so altered as to make rehabilitation of the line financially feasible.

As in most abandonments, it is recognized that inconvenience in varying degrees are imposed upon the users of a line to be abandoned, but after weighing all factors carefully, we conclude that the continued operation of the branch, requiring heavy expenditures for rehabilitation, would impose an undue and unnecessary burden upon applicant and upon interstate commerce. See *Colorado* v. *United States*, 271 U.S. 153, and *Oregon-W. R. & Nav. Co. Abandonment*, 175 I.C.C. 492.

Subject to the condition for the protection of employees referred to, we find that the present and future public convenience and necessity permit abandonment by The Baltimore and Ohio Railroad Company of its Ravenswood, Spencer, and Greenville branch line, extending from Ravenswood to Spencer in Jackson and Roane Counties, W. Va.

An appropriate certificate and order will be issued.

APPENDIX

		1961	1962	1963	4 months 1964
1.	Total revenues	$63,989	$64,722	$84,906	$25,923
2.	Revenues to branch	7,200	8,098	9,816	2,743
3.	Revenues to system	56,789	56,624	75,090	23,180
4.	Expenses:				
5.	Maintenance—track	24,947	24,000	24,000	8,000
6.	Train crew wages	36,119	35,772	14,471	2,778
7.	Locomotive expenses	14,887	14,733	5,946	1,141
8.	Station expenses	6,315	6,482	6,595	2,226
9.	Car owner-user costs	6,496	7,360	12,281	3,455
10.	Less-than-carload costs	766	522	18	—
11.	Total costs	89,530	88,869	63,311	17,600
12.	Less branch revenues	7,200	8,098	9,816	2,743
13.	(Loss) to branch	(82,330)	(80,771)	(53,495)	(14,857)
14.	Revenues to system	56,789	56,624	75,090	23,180
15.	Fifty percent	28,394	28,312	87,545	11,590
16.	Fifty percent of revenues beyond line	28,395	28,312	37,545	11,590
17.	(Loss) to branch	(82,330)	(80,771)	(53,495)	(14,857)
18.	Less line 16	28,395	28,312	37,545	11,590
19.	Net system (loss)	(53,935)	(52,459)	(15,950)	(3,267)

Certificate and Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Finance Review Board, held at its office in Washington, D. C., on the 29th day of March, A. D. 1965.

Finance Docket No. 22930

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN RAVENSWOOD AND SPENCER, W. VA.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Board, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the examiner are hereby referred to and made a part hereof;

It is ordered, That the request of The Baltimore and Ohio Railroad Company, applicant herein, for oral argument be, and it is hereby, denied.

It is hereby certified, That subject to the condition referred to in the report for the protection of railway employees, the present and future public convenience and necessity permit abandonment by The Baltimore and Ohio Railroad Company of its Ravenswood, Spencer, and Greenville branch line between Ravenswood and Spencer in Jackson and Roane Counties, W. Va.

It is further ordered, That this certificate and order shall take effect and be in force from and after 35 days from the date of service hereof, and that tariffs applicable to the abandonment herein permitted may be cancelled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in a manner prescribed in Section 6 of the Interstate Commerce Act.

It is further ordered, That when filing schedules canceling tariffs applicable to said branch, the applicant shall in

such schedules refer to this certificate and order by date and docket number.

It is further ordered, That if the authority herein granted is exercised, the applicant shall confirm in writing to this Commission, immediately after abandonment, the date on which such abandonment has actually taken place; and

It is further ordered, That if the authority granted in this certificate and order is not exercised within one year from its date, it shall be of no further force or effect.

By the Commission, Finance Review Board.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Served December 14, 1964

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the recommended order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect, has been served.

Finance Docket No. 22930

BALTIMORE AND OHIO RAILROAD COMPANY
ABANDONMENT BETWEEN RAVENSWOOD AND SPENCER, W. VA.

Decided

Found that the Baltimore and Ohio Railroad Company has failed to show that the present and future public convenience and necessity permit the abandonment of a portion of its line known as the R.S.&G. branch between Ravenswood and Spencer, W. Va.

George C. Doering for applicant

Robert Hart for Public Service Commission of West Virginia, and *J. Henry Barbour* for the Governor's Committee on Wood Utilization of West Virginia, protestants.

George M. Scott for protestants.

Burke W. Fertig, G. C. Ford, Paul D. Maxwell, and *Bevan O. Wilcox* for railway labor organizations, protestants.

Report and Order Recommended by Louis E. Bartoo, Hearing Examiner

By application filed January 7, 1964, The Baltimore and Ohio Railroad Company, applicant, a common carrier by railroad subject to part I of the Interstate Commerce Act, seeks authority under section 1(18-20) of the act to abandon its R.S.&G. branch, 32.77 miles, extending in an easterly direction from Ravenswood, in Jackson County, to the end of the branch at Spencer, in Roane County, all in the state of West Virginia. Unless otherwise indicated, all localities, towns and counties mentioned herein are in West Virginia.

Following receipt of protests from the Public Service Commission of West Virginia, The Board of Public Works of the State of West Virginia, a protest by some 20 users of the rail service on the branch and numerous letters of protest, the application was referred to the examiner for hearing and the recommendation of an appropriate order accompanied by the reasons therefor. A hearing was held at which appearances were entered on behalf of the Public Service Commission, and the Governor's Committee of Wood Utilization, both of West Virginia, for numerous shippers along the branch, and for railway labor organizations. The right to file briefs was waived by all parties to the proceeding.

Although the various railroad labor organizations oppose the abandonment, they request that, if abandonment is authorized, approval be conditioned to require protection for employees adversely affected thereby similar to those imposed in the *Burlington Case*.[1] Applicant is willing to accept these conditions.

The Ravenswood, Spencer and Glenville branch begins at Ravenswood, where it connects with the applicant's Ohio River line and serves stations of Silverton, Varner, Crow Summit, New Era, Sandyville, Meadowville, Duncan, Leroy, Liverpool, Seaman, Dukes, Reedy, Billings, Barrs, Nancy's Run, and Spencer. Ravenswood and Spencer have agents, but the others are non-agency stations. Ravenswood will be served by the Ohio River Line. The population of Spencer is 2,660, Reedy 352, Sandyville 300, Silverton 250, six other stations have populations under 100, and six stations have no listed populations. The area served by the branch is sparsely settled, and the populations of the two counties served by the branch are Jackson 19,200 and Roane 15,100.

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[1] *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700.

The branch was completed on January 4, 1892, by the Ravenswood, Spencer & Glennville Railway Company, wholly owned by the Ohio River Railroad Company. The purpose at the time was to build a line into Glennville, serving the mid West Virginia coal fields in the Glennville area. The line was never completed between Spencer and Glennville. Control of the branch was acquired by applicant August 1, 1900, by acquisition of stock control of Ohio River Railroad Company and the branch has been operated by applicant since that date.

The branch is single-track, and the rail is 85.90, and 100 pounds, most of it rolled before World War I. Traversing hill county, it has many curves ranging up to 14 degrees, with ruling grades of 3.1 percent eastbound and 3.4 percent westbound. The bridges, 59 in number totaling 1.4 miles in length, 25 of which are 50 feet or more in length, are timber trestle bridges. The branch has been under maintained for the past 8 years and its physical condition is very poor. The maximum allowable speeds on the branch are 5 to 10 miles per hour and weight limitations are 240,000 pounds on the first three bridges east of Ravenswood and 200,000 pounds on the rest of the branch. The above factors limit operations on the branch to a 1,000 horsepower diesel yard-switching engine and a limited number of cars. The actual limit is 550 gross trailing tons.

Applicant estimates the gross salvage value of the branch as $256,270, the removal cost at $143,600, or a net salvage value of $112,670. This estimate does not include and no evidence was presented to show the value of the land.

Until February 1, 1963, passenger service was rendered on the line by means of a mixed passenger and freight train operated in round-trip service six days a week. On that date passenger service was discontinued and freight service was cut to a demand schedule. Freight service is rendered two or three days each week depending on

traffic requirements. Less-carload shipments weighting less than 8,000 pounds are not accepted for movement on the branch.

There is neither traffic local to the branch nor overhead traffic. In 1963, 267 outbound and 272 inbound carload shipments were handled on the branch. In 1958, the outbound carload shipments numbered 79 and inbound were 870 and in 1953, there were 244 and 845 carload shipments. In totals, there were 1,089, 949, and 539 carload revenue shipments handled on the branch in 1953, 1958, and 1963. In 1963, the major items of traffic over the branch were outbound shipments of pulpwood, logs, lumber, poles and posts, and inbound shipments of west coast lumber, wallboard, plywood, roofing and insulating materials, clay, animal feeds, foodstuffs, and paper and paper products. Some 184 carloads of non-revenue traffic also moved outbound which was not included in the 548 carloads of revenue freight. The principal commodities handled on the branch in 1963 were pulpwood 248 carloads, lumber 60 carloads, feed 35, logs 28, flour 26, wallboard 25, and clay 23, totaling 485 carloads. Spencer is located at the end of the branch and is the primary community served by it, except for outbound shipments of pulpwood and forest products from Billings and Reedy. There are not private sidings on the branch and all inbound and outbound traffic is handled to and from team tracks.

The Baltimore-St. Louis line of the applicant extends westward from Baltimore through Clarksburg and Parkersburg and on westward into Ohio. Toward the southwest, the Ohio River line extends from Parkersburg along the south bank of the Ohio River. The branch extends eastward from Ravenswood to Spencer. On the east and southeast the area served by the branch is surrounded by other branch lines of the applicant. The interior of Jackson, Roane, Calhoun and Wirt counties are dependent upon

the branch for rail service. Highway distances from the nearest other railroad station are 33.2 miles from Spencer, 23.6 miles from Billings and 22.1 miles from Reedy. Spencer is served in a north-south direction by state route No. 14 and U. S. Highway No. 119, and U. S. Highway 33 serves Spencer in an east-west direction. Although there is some dispute of the fact, the examiner concludes the area is adequately served by all weather highways. Point Express Company, Cook Motor Lines, and Accelerated Pony Express, motor common carriers, serve the area and Railway Express Agency, Inc., serves Spencer five days a week on its Parkersburg-Charleston truck route.

On March 31, 1964, the applicant had assets of approximately $1,100,010,135 consisting of current assets $87,704,071, special funds $1,142,661, investments $289,651,495, total properties (Net) $715,654,766, and other assets and deferred charges $5,857,142. Its liabilities were: $99,420,807 current liabilities, long term debt due within one year $13,660,919, long term debt due after one year $383,182,489, reserves $2,853,646, and other liabilities and deferred credits $9,155,933. Its total capital stock was $314,694,955, surplus was $3,833,181, and retained income was $273,208,204. With current obligations of $99.4 million plus long term debt due within one year of $13.7 million or a total of $113.1 million, compared with total current assets of $87.7 million, applicant does not have current funds for extensive improvements.

The Income statements show net income after fixed charges and other deductions of $16,068,689, $14,809,203, $2,611,646, a loss of $31,347,341, and income of $1,606,700 for the years 1958 through 1962, respectively. It is apparent that applicant is short of working funds, and as a result, maintenance expenses on the entire system would of necessity be held down as far as possible. In 1963 and the first three months of 1964, applicant's net in-

come after fixed charges was $5,490,921, and $325,651 respectively.

Operating results for the years 1961, 1962, 1963, and for the first four months of 1964, on the branch to be abandoned computed on the basis of the 50 percent formula approved by the Commission are as shown in Appendix A. In 1963, total revenue of $84,906 accrued to the applicant from all freight handled on the branch and from miscellaneous receipts on the branch consisting of $84,494 from carload freight, $161 from less-carload freight, and $251 from demurrage and storage, but excluding facility rental. Of the total $9,816 was assigned to the branch on a mileage prorate basis and $75,090 to the balance of the system. The expenses for 1963 assigned to the branch totaled $63,311 composed of the following: Maintenance of tracks and facilities $24,000, train crew wages $14,471, locomotive expenses including repairs, fuel, and supplies $5,946, station expense $6,595, car owner or user costs $12,281, and less-carload costs $18. Additional expenses totaling $38,257 were said to be the rail form A costs for handling on the balance of the system. Applying total revenues to total costs for the traffic originating at or destined to points on the branch, applicant shows a net operating deficit of $16,662 for such traffic in 1963.

Applicant recognizes that if the proposed abandonment is authorized, it will lose all of the branch line revenue earned on the branch plus net revenue accruing to the system from the handling of branch traffic, but asserts that it will save all of the branch line expenses by the abandonment. Thus on these bases for 1963, it contends it would realize net savings equal to the out-of-pocket loss of $16,662 specified above.

In its computations applicant used an 8-hour day for every round-trip train operated on the branch. Testimony of the operating witnesses indicated an average trip re-

quired 11 hours and this would increase the stated expenses by $8,141 for 1963. This increases the loss to $24,803.

A firm in Spencer purchased new untreated railroad ties for the applicant and these ties are shipped out over the branch and system to a creasoting plant for treatment. Cars carrying such ties are billed as carrier property and are non-revenue freight. There were 184 carloads of ties handled over the branch in 1963; 25.4 percent of total traffic, or about one non-revenue car for every 3 revenue cars.

The physical condition of the track on the branch is such that only a limited number of cars can be operated in a train. The relative number of cars of company material makes it clear that more frequent operation would be required than would be necessary without the company material. The line is entitled to full credit for any additional expenses that applicant would incur in handling their company material on the branch. See *Dawson Ry. Co. Abandonment* 295 I.C.C. 273, 275. See also *Great Northern Ry. Co. Abandonment* 271 I.C.C. 207 at 209-210. Dividing the stated expenses of operating the branch, $71,451, by 723 revenue and non-revenue cars, and multiplying the quotinent $98.82 per car, by the 184 non-revenue cars, produces $18,183; the expenses attributable to the non-revenue cars handled on the branch in 1963. This would have the effect of reducing the claimed savings to $6,620 for 1963.

Restated, revenues to the branch in 1963 were $9,816, the expenses chargeable to the handling of revenue traffic on the branch were $53,268, 50 percent of the revenues apportioned to the system (customarily assumed to be the cost of transporting the traffic moving to and from the branch over the balance of the system), $37,545, leaving a like amount as net revenues to the system from traffic moving to or from the branch which would be lost in the event of abandonment, the result is a net savings to the

applicant of $5,908 for 1963. The number of non-revenue company material cars handled on the branch in prior years are not stated of record nor was any attempt made by applicant to restate the expenses for prior years modified to reflect the discontinuance of passenger service and the six-days a week freight operation. Under the circumstances, the experience for 1963 on the 50 percent basis, will be take as the best available on this record.

Applicant based its maintenance of track and facilities expense data on the actual experience in 1961 and estimated approximately $24,000 per year for 1962, 1963 and the first four months of 1964. Although there was considerable dispute over this expense item, this amounts to about $711 per mile per year which seems quite low even considering the low maintenance level on the branch.

The town of Spencer is located at the end of the branch and is remote from any other rail service. Most of the traffic on the branch originates or terminates in the Spencer area. The primary interest in rail service hinges around wholesale and retail sales activities in building supplies, farm supplies, general merchandising, and in lumbering. Although there is oil and gas activity in the area that industry does not use rail service. The primary resource of the area is its timber reserves which were estimated to be 1.68 billion board feet in the five counties in 1961. The present rate of growth is estimated to be 2.5 times as great as the present rate of cutting. There appears to be constant supply of standing timber in the area to accommodate the present needs of the people located along the branch.

A highway construction company at Spencer uses about 20,000 tons of sand and gravel, presently moving by barge to Ravenswood and by motor truck to Spencer. A lower rate would attract this tonnage to the railroad. This is a potential increase of some 333 carloads of sand and gravel per year.

A large paper manufacturing company is interested in procuring a site along the branch for the purchase, storage, and shipment of pulpwood. The estimated tonnage moving out over the branch from such a yard would be approximately 500 carloads of pulpwood per year. Such a yard would entail annual gross expenditures of some $400,000, a capital investment of $50,000, would furnish income for perhaps 150 suppliers and furnish some work for 600 to 900 people each year. A concentration yard would not be established or continued if rail service was not available. Several other witnesses engaged in various phases of the lumbering industry testified as to increased activity due to a recent freight rate reduction which makes it possible to broaden their sales territory and increase the number of carloads for movement over the branch.

A manufacturer of shoe soling material receives clay in carloads from South Carolina. Other inbound raw materials and outbound shipments of the finished product move by truck. There is some potential rail traffic of the outbound material which active solicitation might develop, particularly under plan V trailer-on-flat-car service.

The town of Spencer is engaged in an urban renewal project and plans to develop 8 acres of industrial property adjacent to the rail right-of-way.

For 1963, except as noted, the five county area[2] retail sales were $34.6 million, personal income was $100.5 million, per capita income was $1,791, population 56,122, bank debts $62.3 million, assessed valuations $151.2 million, motor vehicle registrations 19,764 (1962), and bank deposits were $36.4 million. Although there has been a slight growth during the four years of 1960 through 1963, from the data it is clear that the area is sparsely settled, the per capita income is low, and it is economically a depressed area.

[2] Calhoun, Gilmer, Jackson, Roane, and Wirt counties.

Representatives of two building and supply firms state that inbound supplies of lumber, wallboard, roofing, plywood, and insulating materials are received by rail and that these supplies cannot be handled by truck from some other rail destination to their places of business and sold at a competitive price. Increased prices would shift purchasers to other sources of supply and this in turn would reduce their sale of other items not requiring rail service. A substantial portion of their business would be lost in the event of abandonment.

A wholesale and retail grocer in Spencer who is opposed to the abandonment, receives seed potatoes, flour, feed, fertilizer, canned fruits and vegetables by rail. A part of its inbound shipments are sold at retain in Spencer and a part is sold wholesale in 13 counties surrounding Spencer. If the branch is abandoned, costs of trucking such supplies to Spencer would increase its costs to a point where wholesalers at Charleston and Parkersburg could undersell and take the trade in those items. The retail outlet would have to be supplied from other wholesale firms.

The applicant estimates that $1,450,000 would be required over the next three years to bring the branch to the condition where heavier engines and higher tonnage trains could be operated over the branch at speeds of 20 to 25 miles an hour. During the course of the work salavagable material would produce an estimated $177,944 which would reduce the net cost of rehabilitation to $1,272,166. The planned program would involve a complete replacement of rail, new ties where necessary, upgrading of trackage and bridge structures, reballasting, and some drainage work. A witness for the protestants estimates that he could rehabilitate the branch for maximum speeds of 20 miles an hour for some $592,470. It is clear that the present condition of the branch is poor, that extensive work is necessary to bring it to a more

desirable condition, and that improved bridges, reballasting, realigning and leveling would, by permitting the use of heavier engines and higher speeds ultimately which would reduce the unit expenses of moving carload traffic on the branch. From the evidence it is not possible to determine with any degree of accuracy the precise amount that would be required to rehabilitate the branch.

General Discussion

The demand for rail service has declined over the past 10 years but there is evidence that the future may develop more demand for the service. If the branch line is continued in service, there is a clear possibility of as much new potential traffic as moved over the line in 1963. This potential traffic consists primarily of pulpwood, lumber, sand and gravel, which are products moving on low rates, but the impact on future revenues would be large; perhaps $150,000 or more per year. In addition lower rates on lumber have made it possible for saw mill operators on the branch to reach into new markets and this will develop some additional traffic in the future. This potential future traffic must be weighed against the relatively small deficit to the system, the necessary cost of extensive rehabilitation work on the branch, the relatively weak financial position of the carrier, and the public convenience and necessity. The number of witnesses showing interest in continued operation of the branch and the present use made thereof support the conclusion that there is a specific need for the service which cannot be satisfactorily met by available alternate services and that this need will grow in the future.

ULTIMATE FINDINGS AND ORDER

Considering the record as a whole, the examiner finds that it has not been shown that the present and future public convenience and necessity permit abandonment by

applicant of its branch line between Ravenswood and Spencer, W. Va., described herein.

Premises considered, it is the ORDER of the examiner that the application of the Baltimore and Ohio Railroad Company for permission to abandon its Ravenswood, Spencer, and Greenville branch line of the railroad described herein, be, and it is hereby denied.

By the Commission, Louis E. Bartoo, Hearing Examiner

Dated at Washington, D. C. this 9th day of December, A. D., 1964.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX A

	1961	1962	1963	4 mos. 1964
1. Total Revenues	$63,989	$64,722	$84,906	$25,923
2. Revenues to Branch	7,200	8,098	9,816	2,743
3. Revenues to System	56,789	56,624	75,090	23,180
4. *Expenses*				
5. Maintenance—track	24,947	24,000	24,000	8,000
6. Train Crew Wages	36,119	35,772	14,471	2,778
7. Locomotive Expenses	14,887	14,733	5,946	1,141
8. Station Expenses	6,315	6,482	6,595	2,226
9. Car owner-user costs	6,496	7,360	12,281	3,455
10. LCL Costs	766	522	18	
11. Total Costs	89,530	88,869	63,311	17,600
12. Less Branch Revenues	7,200	8,098	9,816	2,743
13. Loss to Branch	82,330	80,771	53,495	14,857
14. Revenues to System	56,789	56,624	75,090	23,180
15. 50%	28,394	28,312	37,545	11,590
16. 50% of Revenues Beyond Line	28,395	28,312	37,545	11,590
17. Loss to Branch	82,330	80,771	53,495	14,857
18. Less Line 16	28,395	28,312	37,545	11,590
19. Net System Loss	$53,935	$52,459	$15,950	$ 3,267

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 711

THE BURKE–PARSONS–BOWLBY CORPORATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three judge district court (J.S. 1a–2a) dismissing appellants' suit to set aside the certificate and order of the Interstate Commerce Commission (J.S. 20a–21a) permitting the Baltimore & Ohio Railroad (B&O) Company to abandon its 32 mile Ravenswood, Spencer and Greenville (RS&G) branch in West Vir-

ginia. Appellants are the West Virginia Public Service Commission and several companies doing business in the area served by the branch.

On January 11, 1964, the B&O filed an application for a certificate authorizing the abandonment of the RS&G line. Upon the protests of various parties, including appellants, full hearings were held on the application. The hearing examiner recommended that the application be denied (J.S. 22a–33a). The Finance Review Board of the Commission declined to follow the hearing examiner's recommendation. The board found that (1) the RS&G branch had been operated at a loss to the railroad during the years 1962 and 1963 (J.S. 17a), (2) extensive repairs, costing not less than $800,000, would be immediately necessary to rehabilitate the branch if it were to continue in use (*ibid.*), (3) it is improbable that traffic will sufficiently increase to offset the cost of maintaining the branch at safe minimum maintenance standards (J.S. 18a), (4) the additional $800,000 expense for rehabilitation of the branch could not be recovered (*ibid.*), and (5) there is adequate motor carrier service to meet the needs of shippers in the area (*ibid.*). The Board concluded that continued operation of the line would impose an undue and unnecessary burden upon the applicant railroad and upon interstate commerce and that the present and future public convenience and necessity permit abandonment of the line (*ibid.*).[1]

[1] Since the Board stated: "[W]e find that the present and future public convenience and necessity permit abandonment" (J.S. 18a), it is impossible to understand appellants' argument that "[t]he report of the Review Board does not even contain the quasi-jurisdictional finding that the future public convenience and necessity permit abandonment." (J.S. 8)

Petitions for reconsideration were denied by Division 3 of the Commission acting as an Appellate Division (J.S. 8a–9a).

Upon review, the court below found the Commission's decision based upon adequate findings supported by substantial evidence (J.S. 2a–8a). A stay of the Commission's order has been continued in effect pending the outcome of this appeal (J.S. 1a–2a).

ARGUMENT

The decision below is correct, and this appeal does not present a substantial question warranting plenary review by this Court.

Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), provides that no railroad carrier subject to the Act can abandon a line unless it obtains from the Commission "a certificate that the present or future public convenience and necessity permit of such abandonment." In determining whether to issue such a certificate, the Commission must consider and balance the interests involved. *Colorado* v. *United States*, 271 U.S. 153, 169. The only question raised here[2] is whether the Commission adequately considered the prospects for increased traffic over the RS&G line. It is clear that the Commission did so.

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[2] We do not understand appellants to question the Commission's denial of their petition for reconsideration and further hearing in light of the intervening passage of the Appalachian Regional Development Act (see J.S. 7); but, in any event, it is clear that the Commission has broad discretion in passing upon such petitions. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 534–535, and *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514–515.

Having found that a minimum expense of $800,000 would be necessary to rehabilitate the RS&G branch, the Commission reasoned that the applicant railroad should not be compelled to assume this heavy burden "unless potential traffic could be assured to the full extent visualized by the protestants" (J.S. 17a). The Commission then found that the projected increased traffic from both old and new customers would not substantially reduce the losses that would be sustained in maintaining the branch at safe minimum-maintenance standards, much less permit the B&O to recoup the expenses which would have to be incurred for the necessary rehabilitation of the branch (J.S. 18a). See *Purcell* v. *United States*, 315 U.S. 381. The Commission noted that the "speculative nature of the evidence with respect to future traffic detracts from its probatory effect" and that motor carrier competition made substantial increases in traffic unlikely (J.S. 18a). The Commission also found that motor carrier service in the area is adequate to meet the needs of the area shippers (*ibid.*).

In weighing the prospects for future traffic against the costs of continued service and the availability of truck service, it was not necessary for the Commission to determine the probable future traffic "with mathematical exactness." Cf. *Transit Commission* v. *United States*, 284 U.S. 360, 370. Having weighed "all factors carefully" the Commission properly concluded that continued operation of the branch would impose an unnecessary burden upon the applicant railroad and upon interstate commerce, and, thus, the present and future public convenience and necessity permitted

abandonment of the branch (J.S. 18a). See *Colorado* v. *United States, supra,* at 168.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DONALD F. TURNER,
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GREGORY B. HOVENDON,
W. RICHARD HADDAD,
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ROBERT W. GINNANE,
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Interstate Commerce Commission.

NOVEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 711

THE BURKE-PARSONS-BOWLBY CORPORATION, ET AL.,
Appellants,

against

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Southern District of West Virginia

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MOTION TO AFFIRM
of
The Baltimore and Ohio Railroad Company

The Baltimore and Ohio Railroad Company (B&O), intervening defendant before the three-judge District Court and applicant for the assailed abandonment certificate of the Interstate Commerce Commission (Commission), moves that the judgment of the District Court be affirmed on the ground that the questions raised in Appellants' jurisdictional statement are without merit and do not warrant further consideration.

STATEMENT AND ARGUMENT

B&O concurs in, and adopts as though incorporated herein, the statement and argument of the joint motion to affirm being filed by the United States and the Commission. Additionally, B&O points out that the authorized abandonment of the admittedly deficit 32-mile branch line, which handled an average of only 45 revenue carload shipments per month and where rehabilitation expenditures of upwards of $800,000 are necessary to continue the branch at safe minimum maintenance standards, was carefully and properly considered and determined by the three members of the Finance Review Board of the Commission. See *Colorado v. United States*, 271 U.S. 153, and *Purcell v. United States*, 315 U.S. 381. Upon petitions for reconsideration and rehearing, and replies thereto, the abandonment authorization was unanimously upheld by the three members of Division 3 of the Commission. On appeal, followed by extensive briefs and oral argument, the District Court unanimously sustained the action of the Commission, and its opinion analyzed and rejected Appellants' contentions. The District Court tested the Commission's action in the light of applicable standards, found compliance therewith, and concluded that the abandonment authorization "is based upon adequate findings which are supported by substantial evidence."

This appeal merely challenges the adequacy of a particular finding of the Commission. The appeal presents no question as to the scope of the Commission's jurisdiction, no novel question, and no question of statutory interpretation. Accordingly, there is no occasion for plenary consideration by this Court. Appellants are simply disappointed with the Commission's decision authorizing B&O's abandonment and with the District Court sustaining that decision.

While Appellants argue that "The report of the Review Board does not even contain the quasi-jurisdictional finding that the future public convenience and necessity permit abandonment," such contention overlooks the last finding of the Commission's report stating ". . . we find that the present and future public convenience and necessity permit abandonment . . ." Moreover, the certificate itself also recites that ". . . the present and future public convenience and necessity permit abandonment . . ."

Appellants' fundamental contention is that the Commission "made no positive finding as to future traffic." It is submitted that the following portion of the Commission's report speaks for itself in this regard and constitutes an adequate finding as to future traffic prospects:

> ". . . In view of the fact that operations over the branch have not been profitable for the last 3 years — and there can be no dispute on this point — the applicant should not be compelled to assume the heavy and burdensome financial obligations with respect to the repair and future maintenance of the branch unless potential traffic could be assured to the full extent visualized by the protestants. The traffic and revenues contemplated, however, cannot be predicted with any degree of certainty.
>
> "The prospects that some users — old and new — anticipate increased use of the branch does not warrant finding that the area will generate sufficient traffic in the future to reduce to a substantial degree the losses that would be incurred in operating the branch at safe minimum maintenance standards. Thus, it follows without any doubt whatsoever that costs of rehabilitation which it would be forced to make if we denied the application could not be recouped by applicant. The speculative nature of the evidence with respect to future traffic detracts from its probatory effect. All of the shippers on the branch are either currently using motor transportation for some portion of their movements, or are competing with other shippers employ-

ing motor carrier service. The record is convincing that there is adequate motor carrier service available to meet the needs of the area shippers. Sound judgment dictates that the present pattern of transportation by motor vehicle will not be so altered as to make rehabilitation of the line financially feasible." (328 I.C.C. 114-115)

If Appellants are contending that the Commission should have made a finding as to the precise amount of future traffic, such contention is clearly without merit. See *Transit Commission v. United States,* 284 U.S. 360, wherein at page 370 this Court stated, "the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line." See also *Brotherhood of Maintenance of Way Employees v. United States,* 221 F. Supp. 19, affirmed *per curiam* 375 U.S. 216, wherein the District Court stated at page 25 of its decision, "The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction."

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting plenary consideration, and that the judgment of the District Court should be affirmed.

LAIDLER B. MACKALL,
WILLIAM F. WUNSCHEL,
GEORGE C. DOERING,
Attorneys for Appellee,
The Baltimore and Ohio
Railroad Company.

Dated at Washington, D. C.,
this 9th day of November, 1967.

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No. 711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE BURKE-PARSONS-BOWLBY CORPORATION, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of West Virginia

REPLY TO MOTIONS TO AFFIRM

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November, 1967

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UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of West Virginia

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REPLY TO MOTIONS TO AFFIRM

The motions to affirm raise two matters for which appellants submit this reply.

First, the joint motion of the United States and Interstate Commerce Commission inquires as to appellants' position with respect to the Appalachian Regional Development Act. (U.S.—I.C.C. Motion, p. 3, fn. 2) Appellants reply that they are of the view that Congress, having found specifically that the Appalachian Region is deficient in transportation re-

sources,[1] this recent legislation reinforces the requirement of Section 1 (18) of the Interstate Commerce Act that a finding be made as to the probable future demand for rail transportation prior to authorization of any substantial line abandonment.

Second, in response to the Motion of the Baltimore & Ohio Railroad Company (B & O Motion, p. 4), suggesting, mistakenly, that appellants might contend that the Commission is required to make a finding as to the *precise* amount of future traffic over the branch line in question, we wish to state that, in our opinion, it is essential for the Commission to make a finding, not with mathematical exactness, but with a reasonable approximation, of the probable future public demand for rail service in order to satisfy the requirements of the relevant statutes. (5 U.S.C. 1007 (b) and 49 U.S.C. P (18)). The situation here, however, is that the Interstate Commerce Commission failed to make any finding or approximation whatsoever as to future freight demand while it improperly overruled the specific findings relating thereto made by the Hearing Examiner. As the Interstate Commerce Commission notes in its Motion to Affirm (I.C.C. Motion, page 4), the reason given by the Commission was that the "speculative nature of the evidence with respect to future traffic detracts from its probatory effect". By designating this evidence in such an ambivalent manner, the Commission has not come to grips with the evidence before it respecting future traffic potential.

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[1] Appalachian Regional Development Act, P.L. 89-4, 79 Stat. 5, 40 U.S.C. App. 2; The I.C.C. is required to consider legislation, apart from the Interstate Commerce Act, specifically dealing with transportation problems and facilities. (*McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944))

On the other hand, the agency was most careful to make an approximation of B & O's expense in rehabilitation of the R S & G Branch.

The Motions of both the Interstate Commerce Commission and the Baltimore & Ohio Railroad Company invoke the doctrine of this Court as announced in the early case of *Colorado* v. *U.S.*, 271 U.S. 153. We also rely on that decision. We contend that the Commission cannot possibly balance the equities between the conflicting public and carrier considerations, as contemplated by the *Colorado* decision, and the Appalachian Regional Development Act, without first determining the probable future public demand for rail service in the territory served by the branch line in question. Without such a finding, the requirements of the statutes cannot be met, and the scales of justice cannot be put in balance.

The Motions to Affirm should be denied.

Respectfully submitted,

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November, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BURKE-PARSONS-BOWLBY CORP. ET AL *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 711. Decided December 18, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.